INDEX

TABLE OF AUTHORITIES

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,
Petitioners,

v.

TRANS WORLD AIRLINES, INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Hughes Tool Company and Raymond M. Holliday pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit entered on September 1, 1971, which affirmed a judgment in favor of respondent Trans World Airlines, Inc., of $145,448,141.07 and increased the rate of interest on that judgment from 6% to 7½%.

OPINIONS BELOW

The opinion of the Court of Appeals review of which is sought is reported at 449 F.2d 51 and is set forth at page

108a of the separately-bound Appendix.[1] Earlier opinions in this litigation, also set forth in the separately-bound Appendix, are reported as follows:

(1) The opinion and order of the District Court for the Southern District of New York, dated February 7, 1963, denying petitioners' motion to dismiss the complaint, is reported at 214 F. Supp. 106. (App. 1a)

(2) The opinion and order of the District Court, dated May 3, 1963, ordering the entry of a judgment by default against petitioners and certifying the presence of a controlling question of law, is reported at 32 F.R.D. 604. (App. 13a)

(3) The opinion of the Court of Appeals for the Second Circuit, dated June 2, 1964, affirming the District Court on the question on which interlocutory appeal was allowed, is reported at 332 F.2d 602. (App. 19a)

(4) The orders of this Court granting and then dismissing writs of certiorari as improvidently granted, dated November 16, 1964, and March 8, 1965, are reported at 379 U.S. 912, 380 U.S. 248, and 380 U.S. 249. (App. 44a, 45a, 46a)

(5) The opinion and order of the District Court, dated November 16, 1964, affirming the Special Master's refusal to adopt respondents' proposed interim findings, is reported at 38 F.R.D. 499. (App. 47a)

(6) The opinion and order of the District Court, dated December 23, 1969, confirming the Special Master's damage award in the sum of $137,611,435.95, is reported at 308 F. Supp. 679. (App. 50a)

(7) The opinion, order, and judgment of the District Court, dated April 13 and 14, 1970, including counsel fees of $7,500,000 and costs, is reported at 312 F. Supp. 478. (App. 81a, 93a)

---

[1] Citations to the separately-bound Appendix to this petition are in the form "App. —a." A certified copy of the Joint Appendix printed for the use of the court below has been furnished to the Clerk of this Court, and references to it are in the form, "2d Cir. App. A—." References to portions of the record that were not printed in the Joint Appendix are in the form, "Doc. —."

(8) The opinion and order of the District Court, dated June 10, 1970, granting stay of execution and establishing security pending appeal, is reported at 314 F. Supp. 94. (App. 94a)

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on September 1, 1971. A timely petition for rehearing was filed on September 15, 1971, and denied on September 28, 1971 (App. 163a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does a defendant have a right under the Due Process Clause of the Fifth Amendment and as a part of notice pleading under the Civil Rules to require plaintiff to identify with reasonable specificity the conduct that it claims is illegal before defendant is required to participate in lengthy and expensive deposition proceedings in which plaintiff seeks evidence from the defendant to support the charges of illegality?

2. Is a defendant deprived of property without due process of law in violation of the Fifth Amendment if a court enters a default judgment, as a sanction for refusal to make further discovery, under circumstances that do not permit a presumption that the defendant has no defense to the action, and then treats the default as a conclusive admission of liability and that damage proximately resulted therefrom?

3. After a defendant is in default may a federal court, despite the clear prohibition of Civil Rule 54(c), permit a plaintiff to amend its complaint so that it may be awarded damages substantially greater than those prayed for in the complaint at the time of the default?

4. When the Civil Aeronautics Board has approved an acquisition of control over an air carrier by a person engaged in a phase of aeronautics and has further approved all relevant transactions between them, is the exercise of that control to determine how the air carrier acquires aircraft and the necessary financing therefor immunized

from the operation of the antitrust laws under Section 414 of the Federal Aviation Act?

5. May a subsidiary recover against its parent for violation of the Sherman Act because the parent determines the manner and method by which the subsidiary acquires capital equipment, when the parent is not a competitor of those who manufacture and supply such equipment?

6. Is a corporation that has in no way restrained or monopolized a particular area of commerce subject to damages under the Sherman Act because it has "independent economic significance" and is a "potential competitor" of those engaged in that area of commerce?

7. May a plaintiff recover antitrust damages without introducing any evidence that relates the injuries claimed to the restraint or monopolization of trade alleged and without showing that the plaintiff had the financial ability to do what it claims defendants prevented it from doing?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in the separately-bound Appendix beginning at page 176a. They include the following:

1. United States Constitution, Amendment V.
2. United States Code, Title 15, Sections 1 and 2 (Sherman Act §§ 1, 2) and Sections 14 and 18 (Clayton Act §§ 3, 7).
3. United States Code, Title 49, Sections 1378 and 1384 (Federal Aviation Act §§ 408, 414).
4. United States Code, Title 28, Section 1292.
5. Federal Rules of Civil Procedure, Rules 16, 37, 54, and 55.

STATEMENT OF THE CASE

The Judgment

The judgment below for $145,448,141.07, with interest at 7½%, was entered as a sanction under Civil Rule 37. The District Court ordered that a default judgment be entered against petitioners after Hughes Tool Company ("Toolco") had elected to rest on the merits of its legal positions in order to obtain appellate review of interlocu-

tory orders of the District Court. Following the default order, a hearing was held before a Special Master. It was limited to the amount of damages to be awarded Trans World Airlines, Inc. ("TWA").

The judgment awards $137,611,435.95 as treble damages under the antitrust laws, plus $7,500,000 in attorneys' fees and $336,705.12 as costs.

The Toolco-TWA Control Relationship

Petitioner Toolco was formerly the owner of 78% of the stock of TWA. Petitioner Raymond M. Holliday ("Holliday") is a Toolco executive and was for a time a director of TWA.

The Civil Aeronautics Board ("CAB"), pursuant to Section 408 of the Federal Aviation Act (49 U.S.C. § 1378), twice approved after public hearings the acquisition by Toolco of control over TWA. *Transcontinental & Western Air., Inc., Control by Hughes Tool Co.*, 6 C.A.B. 153 (1944); *Transcontinental & Western Air., Further Control by Hughes Tool Co.*, 12 C.A.B. 192 (1950). The CAB found in 1944 that it had jurisdiction over Toolco's acquisition of control because Toolco had ordered aircraft for TWA, some of which might be sold to airlines other than TWA, and thus was engaged in a phase of aeronautics within the meaning of Section 408. The CAB retained jurisdiction over the Toolco-TWA relationship by approving the acquisition of control only on the condition that individual transactions between Toolco and TWA be limited to less than $200 and total annual transactions between Toolco and TWA to less than $10,000. As a result, every material transaction between Toolco and TWA was submitted to the CAB and approved by it under Section 408 through modification of the original orders approving acquisition of control. The CAB issued nineteen such modification orders, including orders approving the specific transactions that are the subject of this litigation.

In 1960, several large banks and insurance companies demanded, as a condition to their supplying senior financing for TWA's initial jet fleet, that Toolco place its TWA stock in a voting trust controlled by them. Toolco yielded

to this demand on December 31, 1960. The new TWA management, which the lenders installed, filed an antitrust complaint against Toolco, Holliday and Howard R. Hughes ("Hughes"), Toolco's sole stockholder, six months thereafter. Hughes was never served.

The Complaint

The complaint charged in conclusory terms violations of Sections 1 and 2 of the Sherman Act and Sections 3 and 7 of the Clayton Act. Toolco was alleged to be a manufacturer and supplier of aircraft to air carriers and the offenses charged all relate to the alleged exclusion of competitors of Toolco from the TWA market for aircraft. This alleged exclusion of Toolco's competitors was variously denominated an acquisition of stock in violation of Section 7 of the Clayton Act, a boycott, a tie-in, monopolization or an attempt to monopolize, and sales and leases on the condition that TWA not acquire aircraft from any competitor of Toolco.

The complaint alleged a number of acts by Toolco, some during the period of Toolco control and some after the voting trust had taken control, in furtherance of the offenses charged. At the damage hearing, however, TWA limited its claims to the manner in which, under Toolco control, Toolco acquired its initial jet fleet from Boeing and Convair.[2]

The complaint prayed for treble damages of $105 million, divestiture, and other injunctive relief.[3] Since both TWA and Toolco are Delaware corporations, federal jurisdiction was solely dependent on alleged antitrust violations.[4]

---

[2] In the damage hearing, TWA did not seek any damages for conduct of the defendants after the voting trust took control in December, 1960 or because of an alleged conspiracy between the defendants and Atlas Corporation to bring about a merger of Northeast Airlines and TWA or for alleged malicious and wilful interference with TWA's business subsequent to December, 1960.

[3] Toolco sold its interest in TWA in a public offering in 1966.

[4] The answers of Toolco and Holliday denied the alleged violations of law and asserted as an affirmative defense that the District Court had no jurisdiction because of exclusive primary jurisdiction in the CAB.

Toolco Seeks To Discover TWA's Factual Contentions

From the filing of the complaint, TWA sought to take the deposition of Hughes before Toolco obtained a reasonable identification of TWA's factual claims. Toolco urged that the charges of antitrust violations in the complaint were unintelligible because: (1) Toolco had never manufactured airplanes for airlines and was a supplier only to the extent that it had helped its subsidiary acquire aircraft; and (2) such acts as were alleged in the complaint appeared to be immunized from the antitrust laws, under Section 414 of the Federal Aviation Act, by the orders of the CAB approving Toolco's control of TWA and all transactions in which TWA acquired equipment from Toolco. The District Court awarded Toolco priority of discovery.

The deposition of TWA failed to reveal the ultimate facts on which TWA relied to support its claimed antitrust violations.[5] Accordingly, Special Master J. Lee Rankin, who had been appointed to preside over discovery, recommended that a pretrial conference be held under Rule 16, at which TWA would be required to delineate the facts on which it based its complaint and at which the issues could be defined. He announced that he considered the holding of a pretrial

---

[5] The Special Master, J. Lee Rankin, stated:

> I had thought that before we completed the testimony of Mr. Tillinghast [the Chief Executive Officer of TWA], I would be informed about the ultimate facts that the plaintiff was relying upon to support the various allegations of its complaint, which are largely conclusions of law, but do conform to the requirements of the federal rules concerning such complaints.
>
> I did not think that with the chief executive officer of the plaintiff being deposed, we would reach a point at the conclusion where I would not know the ultimate facts upon which the plaintiff was relying to establish those various allegations insofar as they had a bearing upon a violation of the antitrust laws.
>
> But I did find I was in that position. I think that has an important bearing upon what is equitable in asking testimony of principal witnesses of the defendant in this case [*i.e.*, Howard Hughes], and when that should be required. [Doc. 236, Tr. 101.]

conference to be so important to the progress of the litigation that if the parties did not apply to the District Court for a Rule 16 proceeding, which he offered to conduct, he would do so himself.

Toolco promptly applied for a pretrial conference. TWA opposed the application. Toolco also served interrogatories designed to elicit TWA's factual contentions. The Special Master ruled that the interrogatories were proper and that TWA could be of great assistance to the progress of the litigation by answering them promptly. TWA appealed this ruling.

On October 25, 1962, the Special Master set February 11, 1963, as the date for the deposition of Hughes in California pursuant to a witness subpoena. He fixed this date in order to give Toolco an opportunity to bring on a dispositive motion addressed to the complaint after Toolco had obtained a definition of the issues, either through answers to interrogatories and further discovery of TWA, or through a Rule 16 proceeding (Doc. 236, Tr. 59-63, 116-117).

The District Court deprived Toolco of this opportunity. On January 10, 1963, it denied Toolco's application for a Rule 16 proceeding, ordered that TWA need not answer interrogatories until 60 days after completion of the Hughes deposition, and confirmed the February 11th date for that deposition (2d Cir. App. A.-122-126).

The Order for the Entry of a Default Judgment

Shortly after the action was begun Toolco had moved to dismiss the complaint or for summary judgment. This motion was held in abeyance pending a delineation of TWA's factual contentions. Toolco advised the District Court on several occasions that once TWA's factual claims were defined Toolco would be in a position to admit the facts (in contrast to legal conclusions) and obtain a determination whether they gave rise to liability and, if so, to what extent.[6] Deprived of this opportunity by the District

---

[6] For example, as early as October 2, 1961, counsel for Toolco advised the District Court: "We believe this case can be decided, in so far as the complaint is concerned on admitted facts" (Doc.

Court's rulings, and faced with the prospect of a deposition expected to take at least "a good two or three months" (2d Cir. App. A-1908) and to cost Toolco $5 million (2d Cir. App. A-280), Toolco abandoned the motion for summary judgment and brought on for hearing the motion to dismiss.

The District Court denied the motion from the bench (2d Cir. App. A-xix-xx) and refused to certify its denial of Toolco's motion so as to permit an interlocutory appeal under 28 U.S.C. § 1292(b) (App. 12a).[7]

In order to secure appellate review, Toolco on February 8, 1963, filed a Notice of Position, stating that, subject only to whatever judicial relief it might thereafter obtain, it elected to rest on the merits of its position so that it might avoid the burden and the enormous expenses of further pretrial and trial proceedings prior to the time that an appellate court had the opportunity to rule upon the decisions and orders of the trial court (2d Cir. App. A-268).[8] In a hearing the same day, Toolco advised the District Court that by reason of the election it had made, Hughes would not appear for deposition on February 11, 1963 (2d Cir. App. A-281) and that Toolco's position would be the same, and it would not further defend on the merits, even if Hughes should appear (2d Cir. App. A-298-299). Pursuant to its election, Toolco declined to produce documents in addition to some 125,000 documents that it had already

---

48, p. 23). In a memorandum filed on July 12, 1962, counsel for Toolco stated:

> Once the present management of TWA has been compelled to disclose the factual basis for its claims, Toolco will be in a position to admit such facts and seek a determination as to whether they give rise to liability and, if so, as to the extent thereof. It has been the position of Toolco since the commencement of this action that once TWA's management is compelled to disclose what it claims, a determination on the merits as to such claims will be appropriate. [Doc. 100, pp. 24-25.]

[7] The District Court gave no reason at the time for this refusal, although later the court suggested that Toolco could have had review by writ of mandamus (2d Cir. App. A-277).

[8] Toolco, as 78% stockholder of TWA, was bearing 78% of TWA's expenses, in addition to its own.

furnished to TWA (2d Cir. App. A-305). The District Court then indicated it would entertain a motion by TWA for a default judgment (2d Cir. App. A-307).

On February 15, 1963, TWA moved for the entry of a default judgment and also to increase the *ad damnum* from $105 million to $135 million. On May 3, 1963, the District Court granted these motions and referred the matter to the Special Master to determine "the amount of damages to be paid * * *." It also granted the certification under 28 U.S.C. § 1292(b) that it had declined to grant at the time it denied the motion to dismiss the complaint (App. 13a).

The Interlocutory Appeal

Toolco petitioned the Court of Appeals for leave to appeal under 28 U.S.C. § 1292(b). The Court of Appeals limited its review to whether the District Court had jurisdiction of the action and whether the CAB orders were a complete defense to the action. It affirmed the District Court on those issues (App. 19a). This Court granted certiorari but, at this interlocutory stage of the case, dismissed the writ after argument as improvidently granted (380 U.S. 248, 249; App. 45a, 46a).

The Damage Award

At the damage hearing before newly-appointed Special Master Herbert Brownell, TWA for the first time specified the conduct of the defendants that it claimed had injured it and for which it sought damages. On a complaint that alleged a boycott, tie-in, and attempt to monopolize based upon the exclusion of manufacturers and suppliers of aircraft other than Toolco from the TWA market, TWA sought damages because Toolco, not TWA, ordered aircraft from Boeing and Convair for the TWA market.

According to TWA, TWA should have ordered for its initial jet fleet 33 planes from Boeing and 30 planes from Convair——exactly the planes that Toolco ordered for its subsidiary. If TWA, not Toolco, had ordered the planes, TWA contended it would have (1) ordered the planes from Boeing sooner, (2) received all the planes instead of cutting back on the size of the fleet, and (3) purchased all the

planes instead of leasing some of the Boeing jets for a time and purchasing them later.[9]

Special Master Brownell held that the order for the entry of a default judgment established both liability and proximate cause. His Report did not explain how Toolco's ordering planes for TWA instead of TWA's ordering the

---

[9] Petitioners introduced no evidence at the damage hearing other than certain industry statistics and expert testimony as to the amount of damages, if any. The following facts, none of which had ever been in dispute and all of which were well-known to TWA at the time it filed its complaint, were confirmed in the course of the cross-examination of TWA witnesses:

(a) Toolco did not manufacture airplanes for air carriers and did not compete with manufacturers and suppliers of aircraft for air carriers.

(b) Toolco ordered Boeing aircraft promptly after Convair had decided not to manufacture a long-range jet that would have met the unique requirements of TWA.

(c) Toolco ordered jets for TWA only after TWA advised Toolco that it lacked the financial resources to order jets itself.

(d) To the manufacturers whether TWA or Toolco ordered the aircraft made no difference. Toolco's contracts with the manufacturers prohibited the assignment of the right to receive the aircraft to anybody other than TWA without the consent of the manufacturer. A vice president of Boeing testified that Boeing at no time considered Toolco or TWA as separate customers, stating: "We considered that they were and are the same" (2d Cir. App. A-1101).

(e) In March, 1959, after the announcement of improved fanjets, Toolco determined that eight of the Boeing jets and ten of the Convair jets were not needed by TWA for its initial jet fleet and so advised TWA. Pursuant to this decision, in the fall of 1959 Toolco released to Boeing its contractual rights to six long-range Boeing jets then under construction. Boeing sold these planes to Pan American.

(f) Late in 1960 Toolco released its contractual rights to six of the ten Convair planes that had been determined to be surplus to TWA's needs. The six planes were then leased by Convair to Northeast. The remaining four were ultimately delivered to Toolco. Toolco offered these four aircraft to TWA in 1961, but TWA did not accept the offer, and the planes were not used until 1963.

(g) Toolco's financial resources and credit made possible payment for and the delivery of 19 of the Boeing jets. Pend-

planes itself, or the other decisions thereafter made, could conceivably be a violation of the antitrust laws.

The Special Master, on the basis of expert testimony that estimated increased revenues by mechanically applying TWA's load factors to a larger number of aircraft, awarded TWA $27,600,000 for late delivery of jets and delivery of a smaller number of jets than originally ordered. He awarded TWA $5,300,000 because some of the jets were temporarily leased by TWA. He awarded TWA $570,748.65 for disruption of TWA's business because the Convair jets were delivered late. The remaining $12,400,000 of the damage award represents the effect of retroactive application of changes in accounting practices made by TWA two-and-a-half years after this action was instituted. The total award of damages after trebling came to $137,611,435.95.[10]

The District Court confirmed the Report of the Special Master in all respects (App. 50a). Judgment was entered for $145,448,141.07, including attorneys' fees and costs, with interest at the rate of 6%.

The Decision of the Court of Appeals

TWA, Toolco, and Holliday filed cross-appeals from the District Court's judgment. TWA claimed that the amount awarded was inadequate. Toolco and Holliday maintained that the judgment entered was without foundation, in fact or law, and that the order for the entry of the default judgment under the circumstances of this case and the

---

ing the arrangement of permanent financing, Toolco leased the planes to TWA on a day-to-day basis. The leases were approved by the CAB under Section 408 of the Federal Aviation Act.

(h) Of the 20 Convair planes received by TWA, 19 were delivered after permanent financing was arranged in December 1960.

[10] The Special Master rejected the hypothetical testimony of TWA's financial expert as to about how TWA could have raised on its own the large amounts of financing required for the 63-plane fleet. Despite his rejection of the only testimony as to how TWA could have financed the 63-plane fleet, the Special Master assumed, without explanation, that TWA could have obtained financing for the jet fleet hypothesized by TWA.

effect given to that order by the District Court deprived them of their property without due process of law. The Court of Appeals affirmed the judgment in all respects but one. It increased the interest rate from 6% to 7½% (App. 108a). The total amount of the judgment with interest now stands at over $163 million. Interest alone is running at almost $11 million a year.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals does tremendous violence to due process of law, subjecting petitioners to the largest judgment ever awarded as a sanction for steps that, rightly or wrongly, they fully believed they were entitled to take in order to permit an orderly test of their legal position. The decision distorts the proper application of the Federal Rules of Civil Procedure. It introduces startling innovations into the antitrust laws that, if left intact, will plague and clog the federal courts for years to come. The decision provides the lure of treble damages to bring to the exclusive jurisdiction of the federal courts suits that until now have been regarded as simple state law claims. Finally, the decision virtually emasculates an important section of the Federal Aviation Act and in doing so discourages others in the aeronautics industry from coming to the assistance of struggling carriers and invites collision between the CAB and the courts.

A. Due Process—the right to know the charges prior to lengthy, burdensome and costly discovery

The plainest principles of fairness and due process, as well as orderly procedure, require that a defendant be apprised of the charges against him before he may be compelled to subject himself to discovery, at an immense expenditure of time and funds. This is particularly true in a treble damage action under the antitrust laws, where the conduct charged is a crime and two-thirds of the relief requested is punitive. Those principles were ignored in the decision of the Court of Appeals.

This case has been colored in the popular mind by the image of a man of great wealth so insistent on maintaining

his privacy that he flouts the lawful processes of the United States courts. The image bears no resemblance to the reality of what in fact happened. It was Toolco that made a responsible decision to decline to proceed further in order to test its legal rights. Toolco specifically advised the court that its decision not to proceed would be the same even if Hughes, who had been subpoenaed as a witness, were to appear on the day set for his deposition (2d Cir. App. A-299, A-303-304).

Toolco made its decision only after the District Court: (1) refused to require TWA to disclose its factual contentions prior to Toolco's being subjected to a deposition that would have taken months and cost it more than $5 million (2d Cir. App. A-280); (2) determined that the antitrust claims asserted were not within the primary jurisdiction of the CAB and had not been immunized from the operation of the antitrust laws by orders of the CAB approving Toolco's control of and transactions with TWA; and (3) declined to certify its rulings for an appeal under 28 U.S.C. § 1292(b).

Toolco took the position it did because it seemed the only way to obtain appellate review of these interlocutory orders that it believed erroneous without being put to the expense of useless litigation. Its course was suggested by that successfully followed by the United States in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 680-681 (1958), where the United States solicited dismissal of its complaint as a means of obtaining appellate review of an order requiring it to produce a grand jury transcript. See also *United States* v. *Ryan*, 402 U.S. 530, 533 (1971), holding that a person who believes that a District Court has erred in refusing to quash a grand jury subpoena "is free to refuse compliance and * * * in such event he may obtain full review of his claims before undertaking any burden of compliance with the subpoena."[11]

In this case the need for a meaningful identification of TWA's factual contentions was peculiarly great because

---

[11] See also *Allied Air Freight, Inc.* v. *Pan American World Airways*, 393 F.2d 441 (2d Cir.), *cert. denied*, 393 U.S. 846 (1968), described in note 22, *infra*, p. 24.

defendants saw no facts alleged in the complaint that would constitute a violation of the antitrust laws. On the surface, the complaint would appear to be detailed. It is long. It has many paragraphs. It seems to state numerous facts. But on closer examination by petitioners, the allegations appeared meaningless for they all seemed to center on acts and judgments normally and naturally engaged in by a parent in relation to its subsidiary. The complaint uses in abundance the special jargon of antitrust—"boycott," "tying arrangement," "attempt to monopolize"—to describe a normal and legal relationship between a parent and a subsidiary. In addition the complaint simply ignored the orders of the CAB approving Toolco's control of TWA and all transactions between Toolco and TWA. In fact, the complaint makes no reference whatever to the CAB. Yet the complaint alleged that the acquisition of Toolco's stock interest in TWA violated Section 7 of the Clayton Act, a conclusory allegation that made no sense in light of the CAB's approval of that acquisition by Toolco.

Petitioners' reaction to the complaint was that this case was a classic one for summary judgment because the key facts apparently relied upon gave rise to no antitrust claim, and petitioners were ready to stipulate them. Moreover, Toolco knew, and the damage hearing confirmed, that these were the only facts upon which TWA could be relying—for both TWA and Toolco, after 21 years, were aware of all of the facts concerning their relationship. There were, in truth, no facts to be discovered, and it was wholly unlikely that there would be any "genuine issue as to any material fact" between them as to what had happened in the past, however much they might differ about the legal consequences of those events.

For these reasons Toolco sought to ascertain on which of the facts, known to both parties, TWA was relying to support the conclusory allegations of antitrust violations. Special Master Rankin felt the same way. He tried to elicit from TWA and its executives the facts upon which they were relying to establish antitrust violations, but he was unsuccessful.[12]

[12] See his statement quoted at note 5, *supra*, p. 7.

Despite this, the District Court and the Court of Appeals held that the defendants were entitled to a specification of TWA's factual contentions and a delineation of the issues only *after* they had been subjected to an enormously burdensome and expensive deposition for the purpose of permitting plaintiff to seek evidence or leads to evidence to support its ill-defined charges. In so holding the courts below overlooked the function of a complaint under modern pleading as well as the nature of discovery under the Federal Rules of Civil Procedure.

At one time the pleadings were expected to inform a defendant of the facts underlying the plaintiff's claim and to define the issues between the parties. They were not a suitable device for this task. Accordingly, under the Federal Rules of Civil Procedure, the complaint is now expected only to give defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley* v. *Gibson*, 355 U.S. 41, 48 (1957). The defendant's right to know with reasonable specificity the factual nature of that claim is to be vindicated through the various discovery devices provided by the Rules together with pretrial conferences under Rule 16. *Hickman* v. *Taylor*, 329 U.S. 495, 501 (1947). The same principles of simplified pleading that govern a routine personal injury case are applicable also to the most complex antitrust case. However, as the draftsman of the Civil Rules was at pains to explain in the leading case so holding, in complicated cases in which fuller disclosure of the basis of the claim is needed, simplified pleading is workable only because such disclosure can be had by these other devices in the rules, including Rule 16 and the discovery rules. *Nagler* v. *Admiral Corp.*, 248 F.2d 319, 322-323 (2d Cir. 1957).

The most recent and authoritative guidelines for the conduct of the large antitrust case, found in *Manual for Complex and Multidistrict Litigation* (1970), take into account the necessity for a defendant in a "big" case to be informed in the first instance of the basic facts underlying the complaint. Thus the *Manual* recommends a "first wave of discovery" designed to obtain information concerning the transactions upon which the claims for relief are based.

Only after this is completed is discovery on the merits to be allowed in a "second wave of discovery." *Manual* § 1.5.[13]

Yet in this case, when Toolco turned to the various procedures provided by the Rules in an effort to require TWA to disclose the factual basis of the wrongdoing being charged and to identify the issues between the parties, the District Court denied Toolco's motion for Rule 16 procedures, despite the specific recommendation of the Special Master, and refused to require answers to defendant Toolco's interrogatories until after the deposition of the witness Hughes, even though both the Special Master and the District Court found these interrogatories to be proper. Thus the court ordered that Hughes first appear for a deposition on the merits that would be both extensive and expensive, and for which he could not properly be prepared. The estimate that the deposition would cost Toolco in excess of $5 million (2d Cir. App. A-280) was never challenged.[14] Only after the expenditure of that astronomical amount was Toolco to be permitted to have any meaningful description of the nature of the claims against it.

Ordinarily the order of discovery is and must be for the discretion of the trial court. The grant of this broad discretion assumes that it will be exercised to illuminate, rather than to conceal, the issues. In this case, however, the discovery orders of the District Court, taken together,

---

[13] This is not a new perception. Before the present action was commenced, a predecessor of the present *Manual*, approved by the Judicial Conference of the United States, had said that in protracted cases discovery must be confined to the genuine issues necessary for decision and that the court must take affirmative steps to define the issues before discovery on the merits begins. *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351, 386-390 (1960). An even earlier report, also approved by the Judicial Conference, had been to the same effect. *Report on Procedure in Anti-Trust and Other Protracted Cases*, 13 F.R.D. 62, 66-68 (1951).

[14] It is of interest that the District Court, which was not disturbed at the prospect of a deposition that would cost defendants more than $5 million, later felt it proper to observe that prior to this case the highest recoveries on record in cases that had gone to judgment had been $4.4 million and $4.2 million (App. 82a).

denied to petitioners the fundamental right to know the charges against them before being subjected to examination in search of evidence or leads to evidence. The rulings of the District Court deprived Toolco of the opportunity properly to prepare Hughes for the deposition, with intelligent advice of counsel. They deprived it also of the opportunity to obtain a determination, based on the facts claimed by TWA, whether TWA had any bona fide antitrust claims against petitioners. To put a defendant to an expense of $5 million in trial preparation before it is known if there is anything to be tried is so grave an abuse of judicial process as to amount to a denial of due process.

The matter has importance far beyond the confines of this case.[15] The possibilities for harassment of defendants, either for the purpose of inducing a settlement or for other ulterior motives unrelated to the merits of the litigation, are enormous. Particularly in the large antitrust case, where vague allegations of a conspiracy in restraint of trade may result in enormous expenditures on discovery, equal in themselves to a sizable judgment, the rights of a defendant under the discovery rules require protection. The ruling of the Court of Appeals will constitute a particularly enticing temptation to competitors to bring treble damage suits for reasons other than legitimate ones, since the expense of discovery and the knowledge gained therefrom can themselves be competitive weapons of no mean worth.

On the other hand, prompt identification of the issues and the stipulation of undisputed facts will greatly reduce the burden that the "big" case imposes on the federal courts. Here, if the facts relied on by TWA had been specified prior to the default, this case would have been disposed of expeditiously by summary judgment.[16]

---

[15] Certiorari is appropriate "to review undecided questions concerning the validity and construction of" the discovery rules (*Schlagenhauf* v. *Holder*, 379 U.S. 104, 109 (1964)), and to pass on questions of importance in the administration of the Federal Rules of Civil Procedures (*La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 251 (1957)).

[16] The presentation of an intelligent motion for summary judgment requires that a defendant know with some certainty the plain-

Conclusory allegations of a complaint permit the artful pleader to bring his case in the federal courts even though ultimately it turns out that the conduct of the defendant does not support a federal claim or is one for an administrative agency. Only through requiring a prompt identification of the factual claims of a plaintiff and an early determination based on such facts as to whether the claim asserted is one over which the federal court has jurisdiction will the federal courts be relieved of the burden of cases that belong in the state courts or before an administrative agency.

The decision of the Second Circuit approving the actions of the District Court with regard to discovery may be expected to have great influence on courts around the country precisely because appellate decisions on the conduct of discovery are, quite properly, few and far between. Thus, there is an urgent need that this Court clarify for the lower courts the proper management of discovery in complex litigation.

B. Due Process—the use of a default to establish conclusions of law

The need for this Court to speak authoritatively on the effect of a default for noncompliance with the discovery provisions of the Federal Rules of Civil Procedure is highlighted by the fact that both Special Masters, the District Court, and the Court of Appeals all considered that the controlling decision was what the Second Circuit referred to as "the venerable but still definitive case" (App. 126a) of *Thomson* v. *Wooster*, 114 U.S. 104 (1885). This 86-year old case was decided in a procedural system that has long since been put in a museum and it cannot be correctly understood apart from its context.

Thomson involved a default for failure to answer. It did not and could not speak to the use of default as a sanction

---

tiff's factual claims. In this case, for example, though the complaint alleged a boycott (¶ 9(c)), it was not revealed until the damage hearing that the supposed boycott consisted of no more than Toolco's ordering planes for TWA from Boeing and Convair instead of TWA's ordering the same planes from Boeing and Convair.

for enforcement of the discovery rules. Indeed in the same month *Thomson* was decided this Court held that, despite the Conformity Act, a federal court lacked power to order a defendant in an action to appear for the taking of his deposition as authorized by a state statute. *Ex parte Fisk*, 113 U.S. 713 (1885). The even more sweeping discovery now permitted was everywhere unknown in that period.

The courts below read *Thomson* as teaching that a party in default "has admitted the truth of the well-pleaded allegations of the complaint" (App. 48a, 52a-53a, 126a). The view of the first Special Master that even a default judgment "must be just" (2d Cir. App. A-371) and that it was "his duty on behalf of the court to be satisfied of the liability of the defendants * * * " (2d Cir. App. A-372) was rejected (App. 48a). Accordingly the Second Circuit took the position "that the default had the effect of admitting or establishing that the acts pleaded in the complaint violated the antitrust laws and that those acts caused injury to TWA in the respects there alleged" (App. 139a). In accord with this view of the effect of a default, the Second Circuit ruled that "there was no burden on TWA to show that any of Toolco's acts pleaded in the complaint violated the antitrust laws nor to show that those acts caused the well-pleaded injuries" (App. 139a), and that the illegality of Toolco's acts was conclusively established by the default (App. 142a). In these rulings the courts below misread the *Thomson* decision.

What *Thomson* held is that a default admits "facts properly pleaded." 114 U.S. at 110. Evidence will not be heard to dispute those facts. *Ibid.* See also *United States* ex rel. *Harshman* v. *County Court of Knox County*, 122 U.S. 306, 316-317 (1887). Nothing in *Thomson* or in any other case supports the proposition that a default admits legal conclusions. To have included conclusions in a complaint would itself have been improper at a time when there was a rigorous rule that pleadings must be limited to the "dry, naked, actual facts." Pomeroy, *Remedies and Remedial Rights* 576 (2d ed. 1883). Thus it was held that a default did not admit "a mere conclusion of law." *Cragin*

v. *Lovell*, 109 U.S. 194, 199 (1883). Nor did a default admit that the facts alleged constituted a cause of action or authorized a recovery. *McAllister* v. *Kuhn*, 96 U.S. 87 (1877); *Cragin* v. *Lovell*, 109 U.S. 194 (1883); *Ohio Cent. R. Co.* v. *Central Trust Co.*, 133 U.S. 83 (1890); 3 Freeman, *Law of Judgments* 2664-2665 (5th ed., Tuttle 1925).

Today's more relaxed notions of pleading allow the use of conclusions in a complaint, but it is still true that conclusory allegations of an attempt to monopolize do not necessarily constitute a valid antitrust claim. *Central Savings & Loan Assn. of Charlton, Iowa* v. *Federal Home Loan Bank Board*, 422 F. 2d 504, 509 (8th Cir. 1970); *SCM Corp.* v. *Radio Corp. of America*, 407 F. 2d 166, 170 (2d Cir. 1968), *cert. denied*, 395 U.S. 943 (1969). Even after default, it remains for the court to consider whether "the unchallenged facts shown of record establish a legally binding obligation; it adjudicates the plaintiff's right of recovery and the extent of it, both of which are essential elements of the judgment." *Pope* v. *United States*, 323 U.S. 1, 12 (1944).[17]

This view of the effect of a default will not burden the courts. If, for example, a complaint alleges that on a specified date defendant executed and delivered to plaintiff a promissory note in which he promised to pay a specified sum by a certain date and that the money has not been paid (*cf.* Official Form 2), or if it alleges that on a particular day at a particular place defendant negligently drove a motor vehicle against plaintiff as a result of which plaintiff was thrown down and had his leg broken and other injuries (*cf.* Official Form 9), a first-year law student can tell at a glance that the facts admitted by the default give rise to liability. Those usual and routine cases are quite unlike

---

[17] See Civil Rule 55(b)(2), providing that after default the court may hold hearings, if necessary, "• • • to determine the amount of damages or *to establish the truth of any averment by evidence* or to make an investigation of any other matter • • • " (emphasis supplied).

an antitrust case in which there may be hard questions in determining liability even on an admitted state of facts.[18]

The holding of the courts below that a party in default has admitted legal conclusions of the complaint and the illegality of his conduct conflicts with applicable decisions of this Court, is contrary to Rule 37 of the Civil Rules, and is a denial of due process of law. It is settled here that the Constitution bars a court from denying a party all right to defend an action as a punishment for failure to obey a court order (*Hovey* v. *Elliott*, 167 U.S. 409 (1897)), though if a party has failed to produce evidence material to an issue it may be presumed that the party's position on that issue is lacking in merit. *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 (1909). The presumption can constitutionally go no farther than the production order. Failure to produce evidence going only to one issue justifies resolving that issue against the defaulting party but does not permit the court to deny him a right to defend on other issues.[19]

As a result of Toolco's refusing to proceed further in order that it might obtain appellate review of the legal issues that it deemed controlling, petitioners were held to have admitted the illegality of their conduct, and ultimately were penalized by the entry against them of a default judgment that the courts below said was 30 times the largest judgment ever awarded in an American court, whether with

---

[18] In this respect a default is similar to a plea of guilty in a criminal case. Defendant admits his conduct by a guilty plea but may continue to challenge the illegality of the conduct. *Haynes* v. *United States*, 390 U.S. 85, 87 n. 2 (1968;) *Kolaski* v. *United States*, 362 F.2d 847 (5th Cir. 1966). Challenges of this kind rarely occur and do not burden the courts.

[19] *Mitchell* v. *Watson*, 58 Wash.2d 206, 361 P.2d 744 (1961); *People* v. *George Henriques & Co.*, 267 N.Y. 398, 196 N.E. 304 (1935); *Feingold* v. *Walworth Bros., Inc.*, 238 N.Y. 446, 144 N.E. 675 (1924); 4 Moore, *Federal Practice* ¶ 37.03[2.-1] at pp. 37-56 (2d ed. 1970); 8 Wright & Miller, *Federal Practice and Procedure* 763-764 (1970); Note, *Sanctions for Enforcement of Discovery—Constitutionality of Rule 37*, 37 Wash.L.Rev. 175, 181-182 (1962); Note, *The Constitutional Limits of Discovery*, 35 Ind.L.J. 337, 349-350 (1960).

or without a trial.[20] This severe sanction was imposed even though petitioners stood ready to stipulate to the basic facts, once they ascertained with a fair degree of specificity what it was TWA was claiming, so that they might obtain on the stipulated facts an adjudication of whether those facts gave rise to liability and, if so, the extent thereof. The sanction was imposed even though the District Court, which had earlier refused to permit an interlocutory appeal, certified when it entered the order of default that a substantial question existed on which there was ground for difference of opinion about the court's jurisdiction and the immunizing effect of the CAB orders.

When petitioners filed their Notice of Position they took their chances on whether they were right or wrong about the applicable law. They gave up their right to challenge the factual allegations of the complaint. But they cannot be held to have admitted the legal conclusions of the complaint that their acts were illegal and that any damage suffered by TWA was the proximate result of the facts alleged. There can be no presumption of want of merit in their legal position when their refusal to proceed further was because they wished to stand on that legal position.[21] The holding below that because of the default ever the most

---

[20] The very size of the judgment in this case points up its punitive nature and raises serious due process questions. In *United States v. United Mine Workers of America*, 70 F.Supp. 42 (D.D.C. 1946), the District Court, after detailed findings, concluded that an individual and a union had willfully violated a court order in regard to a matter of great public importance and were guilty of criminal and civil contempt. A judgment of $3.5 million was entered against the union. This Court thought that "excessive" and reduced it to $700,000 unless the union failed to comply in the future with the District Court's orders. 330 U.S. 258, 305 (1947). In the instant case the dispute is solely between private parties, the person whose deposition was sought was never served and was not a party to the case, and the judgment was 42 times larger than the one deemed "excessive" in the *United Mine Workers case*.

[21] It is apparently costlier for some litigants to persist in a position in order to obtain appellate review than it is for others. In one case the District Court stayed an antitrust action pending consideration by the CAB. It would not allow a § 1292(b) appeal.

conclusory allegations of the complaint are admitted, and that the illegality and its causal relation to the damages are established, is unsupported by precedent and is a constitutionally impermissible punishment of petitioners for the position they took. It was and is the view of the petitioners that the conduct relied on by TWA had no relationship to a violation of the antitrust laws and that the admissions of TWA at the damage hearing established that fact.[22] The default did not, and constitutionally could not, establish the contrary.

But if a default has the novel effect that the lower courts, by their misreading of *Thomson* v. *Wooster*, have given it, it was contrary to Rule 37 to grant a default judgment. The District Court purported to rely on what were then Rules 37(b)(2)(iii) and 37(d). But Rule 37(b)(2) provided that "the court may make such orders in regard to the refusal as are just, and among others" might render

---

Plaintiff refused to present its claim to the CAB and simply did nothing for two years. The action was then dismissed without prejudice for want of prosecution. On appeal from that dismissal it was held, as plaintiff had contended all along, that the action should not have been stayed. The action was reinstated and plaintiff was allowed to proceed. *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F.2d 441 (2d Cir.), *cert. denied*, 393 U.S. 846 (1968).

[22] An example will illustrate the point. TWA was awarded more than $50 million in damages because of the "diversion" of six Boeing aircraft from TWA to Pan American. The so-called "diversion," according to the testimony of TWA's sole factual witness, consisted of a decision, announced in the spring of 1958, to cut back the number of long-range Boeing jets that TWA would receive, followed some months later by a release to Boeing of Toolco's contract rights to the planes, which rights could not be assigned to anybody other than TWA without Boeing's consent, and the sale of the planes by Boeing to Pan American. By no stretch of the imagination does this "diversion" have anything to do with a boycott of anybody or with a tie-in of anything or an attempt to monopolize the supplying of aircraft to TWA or anyone else. Indeed if, as alleged, Toolco was using or intended to use TWA as a captive market, the "diversion" is plainly inconsistent with the allegation. Thus solely because of the default judgment TWA was awarded over $50 million for the alleged "diversion."

a judgment by default.[23] If a default judgment establishes the illegality of the conduct with which a defendant is charged, it would not be "just" to enter a default judgment, the severest of all possible sanctions, when it is well understood that defendant's refusal to make further discovery is to test the illegality of the charged conduct. Although the limitation to "just" sanctions is addressed in the first instance to the trial courts, it is vigorously policed by the appellate courts, first, because of the constitutional issues lurking so closely in the background if overly drastic sanctions are imposed and, second, because of the general purpose of the Civil Rules to encourage dispositions on the merits. 4 Moore, *Federal Practice* 37.08 (2d ed. 1970); 8 Wright & Miller, *Federal Practice and Procedure,* § 2284 (1970).

The lower courts need direction, written in today's procedural idiom, on the effect of a default—and particularly of a default for failure to make discovery—rather than being required to look to an 1885 decision that is, as the decisions below indicate, readily misunderstood.

C. Conflict Between Circuits—increase in the ad damnum after default

The Second Circuit has taken a position directly contrary to that reached by the Ninth Circuit, as to whether a plaintiff can amend its complaint to increase the damages sought from the defendant *after* defendant has incurred a default for failure to make discovery. Such an increase violates Rule 54(c), which states: "A judgment by default shall not * * * exceed in amount that prayed for in the demand for judgment." See also Rule 55(d), which states: "In all cases a judgment by default is subject to the limitations of Rule 54(c)."

In *Fong* v. *United States,* 300 F.2d 400 (9th Cir.), *cert. denied,* 370 U.S. 938 (1962), default was entered against

---

[23] As a part of the 1970 amendments of the discovery rules, language limiting the court to such sanctions "as are just" was added to Rule 37(d). The courts, however, had always held that the express limitation stated in Rule 37(b)(2) applied also to Rule 37(d). Rosenberg, *Sanctions to Effectuate Pretrial Discovery,* 58 Col.L.Rev. 480, 494 (1958).

a defendant who failed to appear for the taking of his deposition. At the hearing on damages plaintiff was allowed to amend one count of its complaint to state a claim for actual damages in addition to the liquidated damages that it had originally claimed. The Ninth Circuit held that this could not be done. It pointed out that the limitation of Rule 54(c) was "very simple, clear and decisive" and that the court was thus "unable to escape the explicit and emphatic mandate of Rule 54(c) which unmistakably commands that upon the facts and circumstances of this case the judgment 'shall not be different in kind from or exceed in amount that prayed for in the demand for judgment' at the time of the entry of the default." 300 F.2d at 413.

In the face of this ruling, the Second Circuit quite candidly and explicitly recognized that "the authorities do not appear to be in agreement" on this issue and that it had not previously expressed itself on the question (App. 156a). Nevertheless it held that the District Court properly allowed an increase from $105 million to $135 million by amendment after petitioners defaulted and properly awarded the full sum asked in the amended prayer.[24]

Permitting an increase of almost 30 per cent in the amount claimed presents more than an important question of federal procedure. It also poses a due process question. A defendant who elects to refuse to continue discovery in order to test the merits of his legal position runs the risk that this may be costly if he is wrong about the law, but surely, as a matter of basic justice, he is entitled to know what the maximum cost may be.

The conflict between the Second Circuit and the Ninth Circuit on this point can only be resolved by this Court.

D. The Federal Aviation Act—immunity for antitrust violations

Acts authorized by the CAB under Section 408 of the Federal Aviation Act are exempt from the antitrust laws.

---

[24] In fact, before attorneys' fees and costs were added, the judgment was for $137,611,435.95, or more than $2.6 million in excess of even the amended prayer. The original prayer for $105 million is comfortably close to the $100.4 million actually awarded because of the transactions concerning the jet fleet. The increase to $135

So also are whatever other acts are necessary to carry out acts that the Board has authorized and approved. Section 414 of the Act is quite clear on this point. It provides that any person affected by any order made under Sections 408, 409, or 412 of the Act

> shall be, and is hereby relieved from the operations of the "antitrust laws", as designated in section 12 of Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order. [App. 171a-172a.]

Despite this provision, the Court of Appeals on the interlocutory appeal refused to recognize any antitrust immunity for transactions between Toolco and TWA after Toolco's CAB-approved acquisition of control. And it did so even though it recognized that the Board had made orders, subsequent to its approval of control, "approving the specific transactions involving the acquisition of jet aircraft which are the subject matter of this litigation" (App. 31a).

The Court of Appeals did not address itself at all to this issue when the case came back to it, although, as pointed out by petitioners in their brief below, the case was then in a far different posture than it had been in 1964. In the earlier opinion the Second Circuit had only the complaint before it. When the case returned there was also the record of the damage hearing. This made a difference in two important respects.

First, a major portion of the complaint sets out claims for purported violations of the antitrust laws after the voting trust took control of TWA in 1960. Both the Second Circuit on the interlocutory appeal, and the CAB in its memorandum filed with this Court, relied in part on an argument that the Board no longer had jurisdiction over Hughes and Toolco, after Toolco relinquished control in 1960, and that there could be no immunity for

---

million may have been thought necessary to accommodate the change in accounting practices by TWA in 1963, on the basis of which the Special Master and the courts below allowed an additional $37.2 million in damages. See p. 12, *supra*.

post-1960 conduct (App. 29a; Memorandum for the Civil Aeronautics Board as Amicus Curiae at 18, *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 380 U.S. 248 (1965)). That argument for rejecting the claim of antitrust immunity is no longer available. At the damage hearing TWA abandoned its claims concerning the post-1960 events, as well as its claims of conspiracy with Atlas Corporation to merge TWA with Northeast Airlines. It sought and was awarded damages solely for events that occurred in the exercise of Toolco's control of TWA, a control that the CAB had approved.

Second, because it had only the complaint before it when it ruled in 1964, the Second Circuit inevitably was influenced, in passing on the immunity issue, by the allegations of boycotts and tying arrangements with which the complaint is replete. The damage hearing has established that, regardless of the label an artful pleader might put upon them, the acts complained of were decisions about when and how TWA would acquire its initial jet fleet, acts that are the normal incidents of the control that had been approved.

It is understandable that the Second Circuit should not speak again to an issue on which it had once ruled. But this Court has an opportunity to pass on this issue of the effect of CAB approval on the record as it stands today. That full record makes it even more anomalous than it was in 1964 that the courts below should fail to give full effect to the antitrust immunity conferred by Congress in Section 414.

The fact is that immunity was found to exist on one phase of the case but not on others. Immunity was recognized for violations allegedly present in the acquisition of control itself. The District Court said, and the Court of Appeals did not dispute, that:

> The antitrust violations that could possibly be present in such acquisition—that it was a contract in restraint of trade prohibited by section 1 of the Sherman Act, or was an attempt to monopolize prohibited by section 2 of the Sherman Act, or was an acquisition of stock prohibited by section 7 of the Clayton Act—were within the contemplation of the approval orders and pro-

tected by the exemption provided by section 414. [App. 7a.]

Yet the Second Circuit refused to find antitrust immunity for the other transactions that are the subject of this litigation. It ruled this way on the ground that the Board's approval extended to the individual transactions themselves, "not to the whole range of activities which over a period of years constituted the backdrop against which these transactions were effected" (App. 32a). It was never explained why immunity extends to the antitrust violations that could *possibly* be present when control was acquired but not to transactions carried out in the exercise of that control. Even if the views of the Second Circuit about the liability of a parent for "arrogating" the making of decisions in regard to its subsidiary had some validity, there is very little point in immunizing against antitrust attack only those acts that are not antitrust violations in the first place.

Moreover, if antitrust liability in this case, absent CAB approval, could properly have been based upon the novel doctrine of "potential competition" or "independent economic significance," as the Court of Appeals said in its latest decision, the immunity provided by Section 414 must have applied. It was because Toolco's aeronautical activities made it a potential supplier of aircraft to air carriers that Toolco's acquisition of control of TWA required CAB approval in the first place. Whatever "independent economic significance" Toolco can be said to have had, or whatever "potential competition" it may have represented, was well known to and examined in great length by the CAB prior to its approvals. See 6 C.A.B. 153, 155-156 (1944); 9 C.A.B. 381, 382 (1948); 12 C.A.B. 192, 216 (1950).[25]

---

[25] When Toolco in 1956 briefly contemplated manufacturing airplanes itself for TWA, the Board, on its own initiative, ordered an investigation to determine whether the proposed change in Toolco's activities in the field of aeronautics would be a transaction subject to Board approval under Section 408 and, if so, whether it should approve or disapprove. Order E-10360, June 8, 1956 (2d Cir. App. AX-2149). The investigation was terminated when the Board was advised that Toolco had abandoned the proposed manufacturing project. Order E-12604, June 6, 1958.

The Second Circuit took as restrictive a view of the subsequent CAB orders approving individual transactions between Toolco and TWA as it did of the original orders allowing control to be acquired. It was unwilling to hold that "* * * these individual and narrow Board orders immunized the defendants from the operation of the antitrust laws with respect to activities not specifically ruled upon by the Board" (App. 32a). Yet it also refused to recognize immunity as to matters that *had* been specifically ruled on by the CAB. In the judgment below $15.9 million was awarded TWA because in 1959 and 1960 Toolco leased 19 jets to TWA rather than selling them to TWA outright. Whatever may be said about the other elements of damage awarded, it is clear that the Board understood that the jets were being leased to TWA and that this was being done as an interim measure pending arrangements for permanent financing. The leasing of the jets was approved by the Board in five separate orders,[28] in each of which it found that these transactions were "just and reasonable and in the public interest."

The decision of the Court of Appeals will result in confusion about the proper role of the courts in relation to the Board and about the extent to which one who acquires control of an air carrier with CAB approval can rely on an order of the CAB approving a transaction as a grant of antitrust immunity. The decision leaves it to the courts to determine when an approved transaction is immunized and when it is not, depending on such subjective criteria as the court's view of what was the "backdrop" and whether the CAB was or was not aware of all of the facts. The decision reflects a lack of confidence in the agency's ability to make knowledgeable decisions.

The reason for the immunity conferred by Section 414 when applied to an acquisition of control is to permit a person engaged in a phase of aeronautics to assist the con-

---

[28] Orders E-13542, Feb. 26, 1959 (2d Cir. App. AX-2202); E-13873, May 15, 1959 (2d Cir. App. AX-2226); E-14169, July 1, 1959 (2d Cir. App. AX-2237); E-14504, Sept. 30, 1959 (2d Cir. App. AX-2245); E-14877, Jan. 29, 1960 (2d Cir. App. AX-2260).

trolled carrier without running afoul of the antitrust laws. The purpose of retaining jurisdiction over transactions between the two is to insure that the controller does not overreach in dealings with the air carrier by forcing the carrier to take unneeded equipment or the like. For a court to make a *de novo* determination of when or whether immunity is conferred would thwart the purposes of both Congress and the agency. And, at a time when many carriers are in difficult financial circumstances, the decision below would effectively deter anyone else in any phase of aeronautics from coming to a carrier's assistance, because he would not be able to rely on the antitrust immunity that CAB approval and Section 414 seem to confer.

The result reached below is contrary to this Court's holding in *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963), the so-called *Panagra* case. In *Panagra*, the Court examined the extent of the jurisdiction of the CAB over a complaint that charged violations of the antitrust laws in the exercise of control over air carriers by another air carrier and a common carrier. The Court recognized that if the control relationship met the standards of Section 408 as determined by the CAB, it could not violate the antitrust laws.

> It would also be odd to conclude that an affiliation between a common carrier and an air carrier that passed muster under § 408 should run afoul of the antitrust laws. Whether or not transactions of that character meet the standards of competition and monopoly provided by the Act is peculiarly a question for the Board, subject of course to judicial review as provided in 49 U.S.C. § 1486. [371 U.S. at 309.]

The Court observed that the CAB "* * * has its special standard of the 'public interest' as defined by Congress" and pointed out: "If the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide." *Id.* at 310. The Court concluded that for this reason the CAB, and not the federal courts, had exclusive jurisdiction over the control relationship.

It misses the mark to say that the Board is not "any more qualified to consider such charges than the federal

courts, which daily encounter and resolve antitrust problems" (App. 30a). Congress has directed the Board to make a broader inquiry than is open in an antitrust action. Under the first proviso of Section 408 the Board is prohibited from approving any transaction that "* * * would result in creating a monopoly or monopolies and thereby restrain competition * * *." At the same time the Board itself "* * * has properly concluded, in light of the immunity from the antitrust laws conferred by § 414, that it must consider anti-competitive effects less extreme than those limned in the proviso in determining whether the transaction will 'be consistent with the public interest,' as defined in § 102 * * *." *Butler Aviation Co.* v. *CAB*, 389 F. 2d 517, 519 (2d Cir. 1968). But if there is an anti-competitive effect short of a monopoly, the Board may still approve if it finds that, in the light of all the factors listed in Section 102, the overall effect is in the public interest. Sections 408 and 414 become meaningless if a court, taking a monocular view of only the effect on competition, can award huge damages for a transaction that the Board, after the broad inquiry it is required to make, has found to be in the public interest.[27]

The Board, in its orders in 1944 and 1950, did not merely approve the acquisition by Toolco of a financial interest in TWA. It approved, as its orders show on their face and as Section 408(a)(5) of the Act requires, acquisition of "control." Nor did the Board approve control in the abstract without considering the incidents that go with control. When it first approved control it conditioned its approval in a fashion intended "to protect the public interest from any improper coercion of the air carrier by a controlling company on account of any further interest which

---

[27] Thus Professor Davis notes that "* * * the congressional policy expressed in the Federal Aviation Act includes both something more and something less than the antitrust policy." He suggests that a proper accommodation of CAB regulation with the antitrust laws would be to limit judicial action applying antitrust policies to proceedings on judicial review of Board orders. Davis, *Administrative Law Treatise* § 19.06 at 634 (1970 Supp.).

the controlling company may have in some other phase of aeronautics." 6 C.A.B. 153, 157 (1944). It was pursuant to that condition that it approved the specific transactions covering the jet aircraft that are the subject of this litigation. In this case, as is customary, the Board "* * * retained jurisdiction over the agreement to assure that no anticompetitive practices occur and to impose additional conditions if unforeseen contingencies arise." *National Aviation Trades Ass'n* v. *CAB*, 420 F. 2d 209, 221 (D.C. Cir. 1969). It was with regard to these particular parties that the CAB defined "control" as used in Section 408 of the Act as meaning "the existence of a right or power to direct or dominate, whether actually exercised or existing in potential use." 9 C.A.B. 381, 386 (1948). It specifically recognized that Toolco "has sufficient power and influence to control the board of directors of TWA and thereby to manage and direct the usual day-to-day business and financial affairs of the airline." *Id.* at 387. Its approval of Toolco's increased control of TWA was on the basis of a finding that both the public interest and TWA had benefited from Toolco's contributions to TWA, particularly "in the selection and purchase of its equipment * * *." 12 C.A.B. 192, 216 (1950).

The holding in this case that the antitrust laws were violated by Toolco's making decisions as to the manner in which TWA should acquire its jet aircraft, even though the CAB had authorized Toolco to make these decisions and had approved the specific transactions that resulted from the decisions, is plainly inconsistent with Sections 408 and 414 of the Act and with this Court's holding in *Panagra*.

E. The Sherman Act—a parent's decisions in regard to its subsidiary

The opinion of the Court of Appeals approves the award of more than $145 million in antitrust damages because of "[t]he illegality of Toolco's arrogation of all authority for buying aircraft * * *" (App. 142a). This ruling extends to a startling degree the liability of a parent corporation

for determining the manner in which its subsidiary does business.

The supposed "arrogation of all authority" consisted of Toolco's deciding that it would order jet aircraft for TWA instead of TWA's ordering precisely the same aircraft from the same manufacturers, the decision as to when these aircraft should be ordered, the later determination that it would be unwise to acquire too many first-generation jets and that TWA should take only 47 of the 63 jets initially ordered, and the decision that TWA should lease aircraft for a time until financing could be obtained to purchase them.

Decisions about when, from whom, and in what quantity a subsidiary should acquire capital equipment are customarily made by the parent. To the extent that these decisions have been too much influenced by the self-interest of the parent or have gone beyond the bounds of business judgment, the traditional remedy has been a claim under state law for breach of fiduciary duty or mismanagement. Note, *The Fiduciary Duty of Parent to Subsidiary Corporation*, 57 Va. L. Rev. 1223 (1971). It has never been supposed that the parent is subject to damages under the antitrust laws for dictating the manner and method by which its subsidiary acquired capital equipment when the parent was not a competitor of other suppliers. Even if the parent is a supplier "[a] subsidiary will in all probability deal only with its parent for goods the parent can furnish." *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 523 (1948).

The report to Attorney General Brownell of an eminent committee was quite emphatic on this point.

> It seems indeed inconceivable to hold *per se* illegal the mere fixing by a parent of a subsidiary's price or production, or the selection by the parent of those persons with whom its subsidiary may or may not deal. [*Report of the Attorney General's National Committee To Study the Antitrust Laws* 35 (1955).]

No case since 1955—except for the present case—has cast any doubt on that conclusion. But under the ruling below, a parent that decides that its subsidiary should buy from

X rather than Y may be held liable for antitrust damages if, with the wisdom of hindsight, the subsidiary can show that the decision was unwise.[28]

This result has the widest possible ramifications. The test of antitrust liability becomes whether the subsidiary has been injured by the decisions of its parent rather than whether these decisions restrain or monopolize trade. This is a distortion of antitrust law that will have a calamitous effect on the federal courts. All a plaintiff in these circumstances need do is invoke the language of antitrust for what is essentially a "mismanagement" case and there will be exclusive federal jurisdiction over what until now would have been a state law claim that in many instances could only be brought in the state courts.[29] With the tantalizing prospect of treble damages as a lure, few plaintiffs are likely to resist the invitation to make a federal case out of it.[30]

---

[28] The holding that the subsidiary may recover from the parent would seem to have the corollary that those who are excluded from the market represented by the subsidiary's needs because of the parent's decision also have a right of action under the antitrust laws. Yet in this case TWA did not want Douglas jets. Certainly neither Boeing nor Convair was excluded from supplying aircraft to the market represented by TWA's needs.

[29] TWA and Toolco are each Delaware corporations. It is only because the claims were under the antitrust laws that the federal courts have been burdened for more than a decade with this massive case. A different panel of the Second Circuit had a wiser perception when, one day before the decision in this case came down, it held that conclusory allegations in a complaint are not enough to "bootstrap" a "garden-variety customer's suit against a broker for breach of contract" into a violation of the Securities Exchange Act. *Shemtob* v. *Shearson, Hammill & Co.*, 448 F.2d 442, 445 (2d Cir. 1971).

[30] That this is the wrong moment in history to invite more antitrust cases is evident from the fact that the number of private antitrust actions commenced has increased from 228 in 1960 to 1445 in 1971. *1971 Annual Report of the Director of the Administrative Office* II-108.

F. Potential Competition—a Clayton Act test for a Sherman Act violation

The Court of Appeals has departed from decisions of this Court, and its own prior decisions, by improperly holding that the standards used to determine the existence of violations of Section 7 of the Clayton Act may be used to find violations of Section 1 and 2 of the Sherman Act. This unprecedented theory of antitrust liability will generate great confusion unless overturned by this Court.

In its complaint, TWA alleged that Toolco was a manufacturer and supplier of aircraft to air carriers, an allegation absolutely essential to its claims that Toolco restrained or monopolized the business of supplying aircraft. The evidence at the damage hearing, however, established that Toolco has never manufactured aircraft for sale to air carriers and has never been a competitor of those who do manufacture and supply aircraft to air carriers.[31] Only that "blind" court, against which Chief Justice Taft admonished in a famous passage, that does not see what "[a]ll others can see and understand * * *"—*Bailey* v. *Drexel Furniture Co.*, 259 U.S. 20, 37, (1922); *cf. United States* v. *Rumely*, 345 U.S. 41, 44 (1953)—could have any doubt on this point. Thus, though the Court of Appeals paid lip service in a paragraph to the notion that judicial notice cannot be taken of indisputable facts in CAB records (App. 133a), it recognized the weakness of that position and developed a new theory on which Toolco would be liable though, as is the fact, it has never manufactured aircraft for air carriers nor has it been a supplier of aircraft to air carriers other than its subsidiary, TWA.

The Second Circuit said that even if it is a fact that Toolco is not a major force as a supplier, this does not "negative the possibility that Toolco possessed independent

---

[31] In its brief in the court below TWA conceded that "* * * defendants did not manufacture and sell a 'Hughes jet' during the damage period * * *." Brief for Plaintiff-Appellant Trans World Airlines, Inc., p. 94.

economic significance" sufficient to support antitrust liability (App. 134a).[32]

The Court of Appeals cited no cases to support its theory that "independent economic significance" or a potential ability to compete are enough for Sherman Act liability. Nor could it. Indeed only recently the Eighth Circuit has affirmed dismissal of a complaint charging a Sherman Act violation where the most that could be said was that the defendant "would have the power potentially to engage in some unfair and predatory practices in this field, but there is no showing of unfair or predatory practices." *Hiland Dairy, Inc.* v. *Kroger Co.*, 402 F. 2d 968, 975 (8th Cir. 1968), *cert. denied*, 394 U.S. 903 (1969).

The Court of Appeals has taken an antitrust theory heretofore carefully limited to merger cases under Section 7 of the Clayton Act and converted it into an entirely new theory of Sherman Act violation. Indeed the standard it applied is not even the appropriate standard for Clayton Act liability, for there must be proof that a merger will *probably* injure potential competition and not merely *possibly* do so.[33] The Court of Appeals based liability on a

---

[32] The Court continued:

> There is evidence in the record of activities by Toolco or Hughes that suggest significant movement by Toolco and Hughes toward actual or potential commercial manufacturer or dealership in airplanes, especially jets, and their parts. * * *
>
> The evidence that Toolco's interests and ambitions in commercial air flights may have extended beyond mere management of TWA begins with Toolco's admitted role, initiated in World War II and continuing to the present day, as a substantial manufacturer of helicopters and aircraft parts for military purposes (and now of aerospace materials as well). Although Toolco stresses the non-commercial nature of this activity, it is clear that Toolco throughout the relevant period had the technical capability and sophisticated "know-how," to enter the commercial market without untoward delay if it had so chosen. [App. 136a.]

[33] The correct standard has been summarized by this Court as follows: " * * * Congress used the words '*may* be substantially to lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties. Statutes existed for

mere possibility. But even if the standard used by the Second Circuit were the correct one in Clayton Act cases, it has no application in determining violations of Sections 1 and 2 of the Sherman Act.

This Court has consistently distinguished the differing purposes of these statutes. For example, in *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1957), the Court said:

> The Clayton Act was intended to supplement the Sherman Act. Its aim was primarily to arrest apprehended consequences of inter corporate relationships before those relationships could work their evil, which may be at or any time after the acquisition, depending upon the circumstances of the particular case.

And the Court has quoted from the legislative history of the 1950 amendments of the Clayton Act to show that that statute is based on "the concept of reasonable probability" since it "seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 323 n. 39 (1962).

These clearly delineated distinctions between the two statutes had previously been understood by the lower courts, including the Second Circuit.[34] With the stroke of a pen, and with no citation of cases, this decision has now undone this understanding of the law. To import the

---

dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 323 (1962). See also *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 658 (1964).

[34] As a different panel of the same court said in another case:

> The legislative history of the amendment makes it plain that Congress intended by § 7 to forbid mergers which were beyond the reach of the Sherman Act as judicially interpreted. • • • Thus under § 7 as amended the Sherman Act test is no longer appropriate, • • • and conduct may fall under the ban of amended § 7 before it has attained the statute of an unreasonable restraint of trade. [*American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 259 F. 2d 524, 527 (2d Cir. 1958).]

Clayton Act test into a Sherman Act case has no basis in precedent or logic.

Here, for example, the trade and commerce of supplying aircraft was not in any way restrained or monopolized because Toolco might have contemplated becoming at some time in the future a manufacturer of jet aircraft in competition with Boeing and Convair, particularly since any concrete steps in this direction by Toolco would have invited instant scrutiny by the CAB.[25] Nor did this potential competition or any "independent economic significance" Toolco may have possessed in any way injure TWA. TWA cannot have been damaged in the past because "the technical capability and sophisticated 'know-how' " of Toolco were such that it might possibly have played a different role in the future had it chosen to do so. In upholding recovery on these grounds, the Court of Appeals again has flung open the doors of the federal courts to a host of plaintiffs who will seek to test this novel theory for imposing treble damages in Sherman Act cases.

G. Proximate Cause—assumption of facts without proof to support them

When this case was before this Court in 1965, Justice White put the following question to counsel for TWA: "How can you prove how much you have been damaged without showing what you have been damaged from?" Transcript of Argument at 28, *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 380 U.S. 248 (1965). Seven years of further litigation have failed to provide an answer to that question.

Even if it be assumed, either because of the default or on some novel theory of "independent economic significance," that liability for some violation of the antitrust laws properly could have been found in Toolco's control of TWA, that liability does not mean—at least under traditional doctrines of antitrust law—that TWA could recover

---

[25] See note 25 *supra*, p. 29.

damages unless the injuries for which it claimed damages were "proximately caused" by the violations of law. Even where liability is admitted the burden is on plaintiff to establish a causal relation between the illegal acts and the injury. *E. V. Prentice Mach. Co.* v. *Associated Plywood Mills, Inc.*, 252 F. 2d 473 (9th Cir. 1958), *cert. denied*, 356 U.S. 951 (1958).

The Court of Appeals recognized that there was a "sense" in which it was "TWA's burden to show 'proximate cause,'" but immediately said that "[o]n the other hand, there was no burden on TWA to show that any of Toolco's acts * * * caused the well-pleaded injuries, except as we have indicated that it had to for the purpose of establishing the extent of the injury caused TWA, in dollars and cents" (App. 139a).

The damages awarded TWA were not because of any restraint on the trade of supplying aircraft to air carriers or because of any monopolization of that trade. Rather they were for conduct in the exercise of control that allegedly injured TWA, whether or not that conduct restrained or monopolized trade. Thus a substantial portion of the damages for which recovery was allowed were because, in the opinion of TWA's witness, Toolco was tardy in ordering from Boeing the Boeing planes that TWA wanted. Perhaps—though Toolco vigorously denies this—TWA was damaged by the delay in placing the orders, but it would be absurd to suggest that by that delay Boeing's trade or the trade of any other "potential competitor" of Toolco was restrained or monopolized.

Similarly TWA was awarded damages because it leased planes for a time from Toolco instead of buying exactly the same planes. It is true that TWA alleges that the leases, which were approved by the CAB, contained a condition that TWA would not purchase or lease planes from a competitor of Toolco. But the damages that TWA claimed, as Special Master Brownell recognized (2d Cir. App. following A-1966), were because of the greater cost of leasing than buying and had nothing to do with any alleged condition in the leases.

To its theory that a plaintiff may recover antitrust damages for conduct that did not restrain or monopolize trade, the Second Circuit has added the doctrine that proximate cause can be supplied by assumption, not proof. Prior to this case the lower courts had refused to approve a rule that would impose liability without any proof that the violation caused the injury. *Klinger* v. *Baltimore & O. R. Co.*, 432 F. 2d 506, 516 (2nd Cir. 1970). They had insisted that a plaintiff has the burden of establishing that he would and could have achieved the results he claimed that he was prevented from achieving by the alleged violation. *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F. 2d 561 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952).

Yet in this case TWA has been allowed to recover because it did not acquire 63 jet aircraft without any proof that it could have raised the $350 million required for the purchase. TWA apparently recognized that it had this burden, for it introduced expert testimony to show how it could have financed this fleet. *Both the Special Master and the District Court rejected this evidence* (2d Cir. App. following A-1966; App. 77a-79a). But the District Court held that because of the default TWA was not required to show that it could have financed the fleet (App. 64a-65a), while the Second Circuit proceeded to *assume* that TWA could have financed the purchase of 63 jets, citing the fact that other airlines had financed their jet fleets and ignoring the fact that those airlines were experiencing substantial profits while TWA was suffering losses (App. 147a).

Any loosening of the requirements of proof in antitrust litigation is an invitation for more suits of that kind and encourages attempts to convert routine state law claims into antitrust claims, with the genuine state law claim often joined as "pendent" to the antitrust claim. This Court should finally determine the nature and extent of a plaintiff's burden, before he may recover antitrust damages, to establish a causal relation between the antitrust violation and the damages and to show his ability to do what he claims he was prevented from doing by the violation.

H. Summary of Reasons

Seven detailed reasons why this Court should grant certiorari have been presented above. It would be unfortunate, however, if the details of particular reasons should cause sight to be lost of the overall effect of the proceedings below. What has happened in this case is an outrage. The lower courts, mistakenly thinking that their authority had been flouted to protect the privacy of a wealthy man, have responded in a fashion that not only departs alarmingly from the usual course of judicial process but also represents a denial of due process. The precedents they have created, if allowed to stand, will inflict serious wounds on sound principles of procedure and antitrust law and will impose heavy burdens on the federal courts.

CONCLUSION

For the reasons stated, this writ should be granted and the judgment of the Court of Appeals for the Second Circuit reversed.

Respectfully submitted,

CHARLES ALAN WRIGHT
2500 Red River
Austin, Texas 78705

CLARK M. CLIFFORD
THOMAS D. FINNEY, JR.
CLIFFORD, WARNKE, GLASS,
McILWAIN & FINNEY
815 Connecticut Avenue, N.W.
Washington, D. C. 20006

E. BARRETT PRETTYMAN, JR.
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D. C. 20006

CHESTER C. DAVIS
MAXWELL E. COX
DAVIS & COX
120 Broadway
New York, New York 10005

Attorneys for Petitioners